

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

HUGH D. CURRAN,)	
)	
Plaintiff)	
)	
v.)	Civil Docket No. 96-52-P-H
)	
MEBA PENSION TRUST, et al.,)	
)	
Defendants)	

RECOMMENDED DECISION ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

The parties have filed motions for summary judgment on all claims in this action arising out of the plaintiff's receipt of employment-related benefits from the defendants. The plaintiff, Hugh D. Curran, a former member of the Marine Engineers' Beneficial Association ("MEBA"), brings this action under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 *et seq.*, against the pension fund and medical benefit plan established by MEBA. In his amended complaint (Docket No. 3) Curran seeks recovery of benefits allegedly wrongfully withheld under the fund and plan (Counts I and II), declaratory judgment concerning his rights under the fund and plan (Counts III and VI), injunctive relief (Count IV), a finding that the defendants have breached their fiduciary duty (Count VII), and attorney fees and costs (Count VIII). There is no Count V in the amended complaint. In their counterclaim (Docket No. 4) the defendants seek recovery of alleged overpayments (Count I) and damages for fraud (Count II).

I. Summary Judgment Standards

Summary judgment is appropriate only if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). “In this regard, ‘material’ means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute over it is resolved favorably to the nonmovant. By like token, ‘genuine’ means that ‘the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party’” *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party’s case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and “give that party the benefit of all reasonable inferences to be drawn in its favor.” *Ortega-Rosario v. Alvarado-Ortiz*, 917 F.2d 71, 73 (1st Cir. 1990). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, “the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue.” *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir. 1995) (citing *Celotex*, 477 U.S. at 324); Fed. R. Civ. P. 56(e).

The mere fact that both parties seek summary judgment does not render summary judgment inappropriate. 10A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* (“Wright, Miller & Kane”) § 2720 at 19. For those issues subject to cross-motions for summary judgment, the court must draw all reasonable inferences against granting summary judgment to determine whether

there are genuine issues of material fact to be tried. *Continental Grain Co. v. Puerto Rico Maritime Shipping Auth.*, 972 F.2d 426, 429 (1st Cir. 1992). If there are any genuine issues of material fact, both motions must be denied as to the affected issue or issues of law; if not, one party is entitled to judgment as a matter of law. 10A Wright, Miller & Kane § 2720 at 24-25.

II. Factual Context

The parties do not dispute the following facts. Curran was a licensed ship officer with over twenty-five years of service prior to January 1, 1993. Amended Complaint ¶ 8; Answer ¶ 8. During this time, his employers were required by the terms of collective bargaining agreements to contribute on his behalf to defendant MEBA Pension Trust (the “Trust”), a multi-employer pension plan within the meaning of ERISA, specifically 29 U.S.C § 1002(2), (3) and (37)(A). Declaration of Peter Klein (“Klein Dec.”), Exh. A to Defendants’ Statement of Material Facts (Docket No. 12) (“Defendants’ Statement”), ¶ 2 & Exh. 1.¹ The Trust is maintained pursuant to an Agreement and Declaration of Trust and is governed by a board of trustees composed of equal numbers of representatives of employers and MEBA. Agreement and Declaration of Trust, Exh. 1 to Defendants’ Statement, § 3.1 at 11. Curran was also covered under the defendant MEBA Medical and Benefits Plan (the “Medical Plan”), Amended Complaint ¶ 12; Answer ¶ 12, a multi-employer welfare benefit plan within the meaning of 29 U.S.C. § 1002(1), (3) and (37)(A), Klein Dec. ¶ 4.

On January 1, 1993, Curran retired and began to receive a monthly retirement benefit from the Trust in the amount of \$4,457.34, less withheld taxes. Amended Complaint ¶ 10; Answer ¶ 10.

¹ The executed original of the Klein declaration appears in the record as Docket No. 14. The Klein declaration attached as Exhibit A to the Defendants’ Statement of Material Facts is an unexecuted copy.

Curran was 55 years old when he retired. Deposition of Hugh D. Curran (“Curran Dep.”), Exh. B to Defendants’ Statement, at 5. Curran signed a Declaration Of Retirement From Maritime Industry on September 28, 1992, which includes an acknowledgment of penalties imposed by the Trust and the Medical Plan should he return to work aboard a vessel. Exh. 3 to Curran Dep. He also completed and signed a Request For An Acceptance Of Termination Of Membership form concerning his membership in MEBA. Exh. 1 to Curran Dep. This form records Curran’s statement that he had read the Plan regulations concerning post-retirement employment and would remain withdrawn during his retirement from any employment aboard a vessel. *Id.*

The board of trustees of the Trust have established regulations governing administration of the pension plan. Section 4.4 of the Agreement and Declaration of Trust provides that

[t]he Trustees shall have complete authority, in their sole and absolute discretion, to (i) interpret the terms of the Trust, the Plan, any insurance contracts or policies (and any related documents and underlying policies) and (ii) determine eligibility for, and the amount of, benefits under the Plan. All such interpretations and determinations of the Trustees shall be final and binding upon all parties and persons affected thereby.

Exh. 1 to Klein Dec. at 17-18. Identical language appears at Article XI, Section 11.04 of the Pension Plan Regulations. Exh. 2 to Klein Dec. at 130.

The following sections of the Pension Plan Regulations are also relevant here:

Article II-A, Section 2A.11

To be considered Retired, an Employee must:

(a) withdraw completely from:

- (1) Covered Employment;
- (2) work aboard any vessel; and
- (3) in the case of a Port Engineer, Port Electrician or Hull Inspector, any service in the maritime industry that involves a Licensed Officer’s knowledge or expertise, including, but not limited to, knowledge or

expertise in construction, repair, operational or maintenance activities.

(b) complete the taking of his earned vacation; and

(c) furnish the Plan Office with satisfactory documentary proof that he has withdrawn from membership in the Association, or the ROU, and has surrendered his seaman's papers to the Trustees.

Article I, Section 1.06:

The term "Covered Employment" shall mean:

(a) employment for which the Employer is obligated to contribute to the MEBA Pension Trust on behalf of an Employee

Article II-A, Section 2A.12:

A Pensioner shall request, in writing, permission of the Trustees to return to work described in 2A.11(a). A Pensioner who returns to work described in 2A.11(a) without the written permission of the Trustees shall be deemed to be engaged in Prohibited Employment and shall be subject to the penalties set forth in 2A.14.

Article II-A, Section 2A.14:

(a) A Pensioner who engages in Prohibited Employment before attaining Normal Retirement Age shall not be entitled to payment of his Pension for any calendar month during which he was so employed and for six additional months, except that under extenuating circumstances and at the discretion of the Trustees, such six month additional suspension of payment may be waived. The Pensioner shall be required to return Pension payments received during periods of Prohibited Employment to the MEBA Pension Trust.

(b) A Pensioner who engages in Prohibited Employment after attaining Normal Retirement Age shall not be entitled to payment of his Pension for any calendar month in which he works five or more days. Pension payments shall resume no later than the first day of the third calendar month after the Pensioner notifies the Trustees that his Prohibited Employment has ceased and provides the Trustees with sufficient information to verify that such employment has, in fact, ceased. The Pensioner shall be required to return Pension payments received during periods of Prohibited Employment to the MEBA Pension Trust.

* * * * *

(e) Any Pensioner who engages in Prohibited Employment shall forfeit all eligibility for benefits under the MEBA Medical and Benefits Plan.

Article I, Section 1.15:

The term “Normal Retirement Age” shall mean the earlier of:

(a) age 65 or the tenth anniversary of the time an Employee commenced participation in the Plan, whichever is later, or, in the case of an Employee in Covered Employment on or after January 1, 1989, age 65 or the fifth anniversary of the time the Employee commenced participation in the Plan

...

Exh. 2 to Klein Dec. at 54, 56, 72-77.

On April 16, 1993, Curran accepted employment with Woods Hole Oceanographic Institute (“Woods Hole”) as First Assistant Engineer aboard the vessel Atlantis II; on May 15, 1993, he was promoted to Chief Engineer. Amended Complaint ¶¶ 20-22; Answer ¶¶ 20-22. The Atlantis II is a research vessel. Exh. 1 to Declaration of Elizabeth A. Saindon, Exh. C to Defendants’ Statement. Curran worked for Woods Hole until May 1995 as Chief Engineer of the Atlantis II; he sailed on at least seven sea voyages during this time. Curran Dep. at 72-82. He remains an employee of Woods Hole and intends to begin service as Chief Engineer aboard a new vessel sometime in 1997. *Id.* at 8-9. Woods Hole does not have a collective bargaining agreement with MEBA and does not make contributions to the Trust. Amended Complaint ¶ 36; Answer ¶ 36.

In April 1995 the administrator of the defendant Trust was informed that Curran was working in maritime employment aboard a vessel, and she undertook an investigation. Exh. 5 to Curran Dep. Curran was informed by letter dated June 6, 1995, that his benefits might be suspended and that he might be obligated to refund pension benefits already received. Exh. 7 to Curran Dep. The Trust suspended Curran’s pension benefit on July 31, 1995, based on the administrator’s determination

that Curran had engaged in Prohibited Employment. Klein Dec. ¶ 6. Curran appealed this decision to the Trust's board of trustees. Exh. 15 to Curran Dep. The appeal was heard on October 30, 1995; Curran presented oral argument and documentary evidence at the hearing. Klein Dec. ¶ 8; Curran Dep. at 71-72, 127-28 & Exh. 4.

The board of trustees decided on October 31, 1995 that Curran's work for Woods Hole was Prohibited Employment under the Trust Regulations. Klein Dec. ¶ 10. By letter dated November 22, 1995 Curran was notified of the trustees' decision and directed to refund \$97,366.54 to the Trust. Exh. 3 to Defendants' Statement. His participation in the Medical Plan was terminated and he was requested to refund \$1,775.92 to the Medical Plan. *Id.* Curran filed this action on March 11, 1996. Docket No. 1.

IV. Analysis

A. ERISA Claims (Amended Complaint, Counts I - IV; Counterclaim, Count I)

Curran asserts that the Trust violated the non-forfeitability provisions of ERISA and its accompanying regulations, both by suspending his monthly payments and by imposing a six-month penalty, and that the Trust also violated the terms of the pension benefit plan. The defendants maintain that the suspension of Curran's pension benefits did not violate ERISA.² Curran also

² The parties agree that their claims concerning Curran's benefits under the defendant Medical and Benefits Plan will be governed by the disposition of their claims concerning his pension benefit under the defendant Trust, Defendants' Memorandum (Docket No. 11) at 16; Plaintiff's Memorandum (Docket No. 19) at 3, even though, as a welfare plan rather than a pension plan, the Medical and Benefits Plan is not subject to the same statutory limitations concerning suspension and forfeitability, 29 U.S.C. § 1053(a). This is due to the language of the Pension Plan Regulations, which deem engaging in Prohibited Employment to be a forfeiture of eligibility for benefits under the Medical and Benefits Plan. Plan Regulations, Title II-A, Section 2A.14(e), Exh. 2 To (continued...)

argues that the defendants are not entitled to recoup the entire amount already paid to him under Count I of their counterclaim, should this court find that he is not entitled to succeed on his substantive claims.

In general, ERISA provides that employees have a nonforfeitable right to receive payment of normal retirement benefits upon reaching normal retirement age. 29 U.S.C. § 1053(a). A multiemployer pension plan may suspend that benefit if the retiree returns to work, under certain conditions. 29 U.S.C. § 1053(a)(3)(B)(ii). However, before the retiree reaches normal retirement age, a plan may suspend his benefits if he returns to any kind of employment. 29 C.F.R. § 2530.203-3(a). Curran began receiving pension benefits before normal retirement age, as that term is defined both by the plan Regulations and by ERISA. 29 U.S.C. § 1002(24). The Plan Regulation at issue here suspends benefits for retirees only if they return to “prohibited employment.” Section 2A.14(a), Exh. 2 to Klein Dec. at 75. Application of those regulations to Curran therefore does not appear to be prohibited by ERISA.

Curran argues, however, that because the Plan Regulations do not differentiate between those who begin to draw pension benefits before normal retirement age and those who begin only upon reaching that age³ the Trust may not take advantage of the exception provided by 29 C.F.R. §

²(...continued)
Defendants’ Statement, at 77.

³ In fact, the Plan Regulations do differentiate between early retirees and retirees of normal retirement age. While “prohibited employment” is defined in the same manner for both, there is a six-month penalty that applies only to the former group, Plan Regulations Article II-A, § 2A.14, and recoupment of amounts paid while the retiree was engaged in “prohibited employment” is limited, in the case of the latter group, to a set-off of 25% of subsequent payments, *id.*, as required by (continued...)

2530.203-3(a). He relies on *Dennis v. Board of Trustees of Food Employers Labor Relations Ass'n*, 620 F. Supp. 572 (M. D. Pa. 1985), and its modification, 625 F. Supp. 976 (M. D. Pa. 1986), to support this argument.

Dennis does not provide support for Curran's position. In its modification opinion, the court held that, because the retiree plaintiff seeking reinstatement of pension benefits suspended due to his employment elsewhere had not reached normal retirement age, the limitations applicable to suspension of benefits payable to retirees of normal retirement age did not apply. 625 F. Supp. at 978-79. The pension plan at issue in *Dennis* did not differentiate between early retirees and retirees of normal retirement age in terms of other work. 620 F. Supp. at 573. Curran does not direct the court's attention to any language in ERISA or its accompanying regulations that requires the interpretation he advocates. The Sixth Circuit, in *Whisman v. Robbins*, 55 F.3d 1140 (6th Cir. 1995), to which Curran refers in his reply memorandum, reaches the same conclusion as did the *Dennis* court. As applied to an early retiree, a plan subject to ERISA is "constrained only by the terms of its plan." 55 F.3d at 1147. As far as Curran is concerned, the defendant Trust's suspension of benefits due to "prohibited employment" is not limited by the terms of 29 U.S.C. § 1053(a).

Curran next argues that the six-month penalty provision violates section 1053(a) because it extends the suspension of benefits beyond the period during which the retiree is actually employed. It is not entirely clear to what extent this position is based on an argument that differs from the one offered by Curran to support his claim concerning the suspension of regular benefits under ERISA. In any event, a six-month penalty provision essentially identical to the one at issue here was held not

³(...continued)
ERISA, 29 C.F.R. § 2530.203-3(b)(3).

to violate ERISA, so long as the six months did not extend past the plaintiff's normal retirement age, in *Chambless v. Masters, Mates & Pilots Pension Plan*, 571 F. Supp. 1430, 1435, 1440-41 (S.D.N.Y. 1983), *aff'd* 772 F.2d 1032, 1041 (2d Cir. 1985). I find the reasoning of that court to be persuasive. The six-month penalty provision as applied to Curran does not violate ERISA.

Curran next argues that suspension of his benefits violates the terms of the Trust plan. An initial question in this regard is the appropriate standard of review. In general, when a pension plan by its terms gives its trustees, administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan, the appropriate standard of review is that "the trustee's interpretation will not be disturbed if reasonable." *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 111 (1989); *see also Rodriguez-Abreu v. Chase Manhattan Bank, N.A.*, 986 F.2d 580, 583 (1st Cir. 1993). This is also known as the "arbitrary and capricious standard" for review of denial of benefits by ERISA fiduciaries and administrators. *Bruch*, 489 U.S. at 107. The arbitrary and capricious standard has been called "the least demanding form of judicial review of administrative action." *Parker v. Metropolitan Life Ins. Co.*, 875 F.Supp. 1321, 1329 (W. D. Tenn. 1995).

Curran concedes that the trust agreement and the Plan Regulations give the trustees in this case such discretionary authority. However, he contends that there is a conflict of interest between the role of the union trustees as fiduciaries for the Trust and their objective of expanding the number of employers with which MEBA has collective bargaining agreements, requiring that a heightened level of scrutiny be applied in this case. Even in cases in which conflicts of interest on the part of trustees have been found to exist, that conflict has been held to be merely one factor in determining whether the denial of benefits may be upheld rather than requiring a strict, *de novo* standard of

review. *E.g., Parker*, 875 F. Supp. at 1330.

In *Mahoney v. Board of Trustees*, 973 F.2d 968 (1st Cir. 1992), the plaintiffs argued that a special, strict standard of review should be applied to review of trustee action because the union trustees, half of the total, benefitted personally from the decision under review. *Id.* at 969, 970. The First Circuit rejected this argument, noting that courts that had applied a stricter standard of review had done so in cases involving conflicts between the interests of beneficiaries and non-beneficiaries, rather than those among the interests of different beneficiaries, *id.* at 972, or where the risk of bias or abuse was particularly great, *id.* at 971. Neither circumstance is present here. Like the situation in *Mahoney*, to apply a stricter standard of review here merely because the union-half of the trustees have an interest, as all union officials would, in expanding the number of employers with which the union has collective bargaining agreements, would mean that a stricter standard of review would apply in virtually all cases and “would risk having courts substitute their judgments for those of the trustees on many questions best left to trustees’ discretion and expertise.” *Id.* at 972.

In order to review the suspension of Curran’s pension benefits under the arbitrary and capricious standard, both parties direct the court to *Lickteig v. Business Men’s Assurance Co. of America*, 61 F.3d 579 (8th Cir. 1995). *Lickteig* involved the denial of medical benefits under a welfare benefit plan, not a pension plan, *id.* at 581, but the same arbitrary and capricious standard was applied, *id.* at 583. “The trustees’ decision to deny benefits will be deemed an abuse of discretion if the action is ‘extraordinarily imprudent or extremely unreasonable.’” *Id.* (citations omitted).

Reviewing [the defendant’s] interpretation of its plan language requires us to examine the following factors: 1) whether the interpretation is consistent with the goals of the . . . Plan; 2) whether it renders any language in the . .

. Plan meaningless or internally inconsistent; 3) whether it conflicts with the substantive or procedural requirements of the ERISA statute; 4) whether [the defendant] has interpreted the provisions at issue here consistently; and 5) whether the interpretation is contrary to the clear language of the . . . Plan.

Id. at 583-84. All five factors must be considered. *Id.* at 584. While not binding in this circuit, *Lickteig* provides helpful guidance for this court's review.

Curran ignores the second factor in his argument and focuses on the first and fourth elements. The second factor must thus be assumed to weigh in the defendants' favor. The third factor also weighs in favor of the defendants inasmuch as I have already found that the suspension of Curran's benefits does not violate ERISA. I will address each of the other factors separately.

Neither Curran nor the defendants has provided any indication of the goals of the Trust in their respective Statements of Material Fact.⁴ On that basis alone, the first factor — whether the interpretation is consistent with the goals of the plan — must be seen as weighing in favor of neither side.

Consideration of the fourth factor — whether the defendants have interpreted the provisions at issue here consistently — requires more extended discussion. Curran emphasizes that there is no definition of the terms “vessel” or “work aboard a vessel” in the Plan Regulations. His Statement

⁴ Curran attempts to avoid the effect of this failure to comply with this court's Local Rule 56 by referring to letters of two MEBA members who were applying for permission to work while receiving pension benefits. Plaintiff's Memorandum at 14 n.6. In the absence of any showing that these individuals intended to state the goals of the Trust, that they had authority to do so, and that these statements are not inconsistent with the language of the Trust plan, that effort would be unsuccessful even if the information had been properly presented. Curran also asks this court to accept what the defendant Trust apparently argued was “the evil at which Art. II A, § 13 was aimed” in another case, *Riley v. MEBA Pension Trust*, 570 F.2d 406, 410 (2d Cir. 1977), as the goal of the Trust for the purposes of this action. It is the goal of the entire plan, not merely that of one section, that is the matter at issue in the first factor of the *Lickteig* test. Again, even if this information had been properly presented, there is no showing that the same section of the plan language is involved or that it is unchanged since 1977.

of Material Facts refers to four instances of interpretation of the provisions at issue here which he contends are inconsistent with the defendants' application of those provisions to him. Plaintiff's Statement of Material Facts (Docket No. 20) ¶ 17. Curran also refers in his Reply Memorandum (Docket No. 27) to additional alleged instances of inconsistent interpretation, but these are not included in his Statement of Material Facts and will not be considered here. The defendants appear to concede that the trustees' 1986 decision to allow a retiree to return to work aboard a shrimp boat may be considered inconsistent. Defendants' Reply Memorandum (Docket No. 26) at 10 n.9. They contend that the remaining three instances are in fact consistent.

The second instance involves MEBA pensioners who were given permission by the trustees to work as volunteers on Liberty Ships in connection with the fiftieth anniversary of the Normandy landing. Exhs. A & C to Affidavit of William H. Laubenstein, III (Docket No. 22) ("Laubenstein Aff."). The defendants contend that, because this work was temporary and unpaid, it was not "work" aboard a vessel within the meaning of section 2A.11(a) of the Plan Regulations, and thus not prohibited employment. It is significant in this regard that section 2A.12 defines "prohibited employment" as occurring when a pensioner "returns to work described in 2A.11(a) *without the written permission of the Trustees.*" (Emphasis added.) The Liberty Ship volunteers obtained such permission. Exhs. A & C to Laubenstein Aff. Given the discretion bestowed upon the trustees by section 2A.12, as well as the unpaid nature of the work, it is difficult to consider this an instance of inconsistency.

The third instance involves work on the Vernon C. Bain, a stationary prison barge. Exhs. J & K to Laubenstein Aff. One pensioner began working on this barge without seeking permission of the trustees, and was initially informed that this violated the Plan Regulations. *Id.* at 001198. The

administrator later informed this individual that, after consulting with counsel, she had determined that the barge was not a “vessel” “as that term is used by the MEBA Pension Trust,” and that he was therefore not working in “prohibited employment.” *Id.* at 001188. Another pensioner received advance written permission to work on this barge. *Id.* at 001156-58. Curran contends that the barge was just as much a vessel as was the Atlantis II, the seagoing research ship upon which he was employed, because the Coast Guard classified the barge as a vessel. Exh. Z to Laubenstein Aff., § 4.c at 4. However, that document also states that the barge will, upon request, be designated “substantially a land structure” and not subject to inspection as a vessel. *Id.* § 4.f at 5. There does seem to be a reasonable basis for distinction between the prison barge and the Atlantis II on this basis.

The fourth instance involves the Virginia V., a restored historic passenger vessel. Exh. O to Laubenstein Aff. The pensioner working on the Virginia V. was paid at a low hourly rate to operate the engine “on charters.” *Id.* at 003604-05. The Trustees ruled that “employment with the Virginia V Foundation . . . is not the type of employment that was intended to be prohibited by the Plan Regulations.” *Id.* at 003603. The defendants’ memoranda do not address this instance, and it does appear to be inconsistent with the treatment of Curran, who was also employed by a nonprofit organization, Exh. AA to Laubenstein Aff. at [4], and the treatment of the Liberty Ship volunteers, who were not paid.

On balance, the fourth factor weighs somewhat in favor of Curran. This factor alone is not determinative, however. *See Weisler v. Metal Polishers Union*, 533 F. Supp. 209, 215 (S. D. N. Y. 1982) (inconsistent trustee action not *per se* arbitrary and capricious).

Curran asserts that the fifth factor — whether the interpretation is contrary to the clear

language of the plan — must be resolved in his favor due to the inconsistent interpretations discussed above. He suggests that inconsistent interpretation by the trustees shows that the language of the plan is ambiguous and therefore it is impossible to determine whether the defendants' interpretation of the plan in his case is contrary to its clear language. Plaintiff's Memorandum at 17. However, Curran's conclusion does not follow from his premise. The interpretation applied to Curran was consistent with the language of section 2A.11(a); it is the differing interpretation in the Virginia V. and shrimp boat cases that appears inconsistent. The fifth factor weighs in favor of the defendants.

Considering all of the *Lickteig* factors, the defendants' suspension of Curran's pension benefit cannot be said to have been arbitrary and capricious in light of the trustees' responsibility to all potential beneficiaries. *Rueda v. Seafarers Int'l Union*, 576 F.2d 939, 942 (1st Cir. 1978). That action was not extremely unreasonable, *Lickteig*, 61 F.3d at 583, nor was it an abuse of discretion, *Diaz v. Seafarers Int'l Union*, 13 F.3d 454, 457 (1st Cir. 1994). *See also Caterino v. Barry*, 8 F.3d 878, 883 (1st Cir. 1993) (discussing arbitrary standard). Summary judgment for the defendants is appropriate on Counts I - IV of the amended complaint.

Finally, it is necessary to consider Count I of the counterclaim. Curran contends that Article IX, § 9.12 of the Plan Regulations⁵ allows the defendants to recover only those benefits paid to him for the twelve months immediately preceding the date of the only notice sent to him by registered

⁵ Section 9.12 provides, in relevant part:

(a) Except as provided in subsection (b), in the event [a Pensioner] is paid an amount above that to which he was entitled pursuant to the appropriate rules, Regulations and interpretations of the Plan, the overpayment shall be refunded to the Plan upon due notice to the payee. . . .

(b) If notice of any overpayment is not sent to the payee by registered mail to the address last filed with the Plan, within one year of such overpayment, the overpayment may be retained by the payee and no claim for refund will be made nor shall a proceeding to collect such overpayment be authorized.

mail, which was June 6, 1995. Exh. 7 to Curran Dep. The defendants respond that the money sought in their counterclaim is not an “overpayment,” but rather a sum that was wrongfully obtained by Curran in violation of the Plan Regulations. Neither side cites any authority in support of its position. Of course, the defendants were unaware that the Trust might be “overpaying” Curran until April 1995. Deposition of Lucille Hart at 100-01. They could not possibly have notified Curran of any “overpayment” before then. The defendants should not be foreclosed from recovering the Trust’s money under these circumstances. *See Delk v. Ford Motor Co.*, 96 F.3d 182, 192 (6th Cir. 1996) (date from which notice of overpayment requirement established by supplemental unemployment benefit plan document subject to ERISA should be calculated cannot occur until fiduciary could be expected to know amount of overpayment). The defendants sent the notice within two months of their discovery that money might be recoverable. They are entitled to summary judgment on this counterclaim count.

B. Estoppel (Amended Complaint, Count VI)

Curran does not present any argument in support of this count of his amended complaint in the memoranda submitted by him in opposition to the defendants’ motion for summary judgment or in support of his own summary judgment motion, nor does he provide any statements of material fact that appear relevant to this claim. The defendants also fail to present any argument on this claim. Ordinarily, entry of summary judgment for any party on this claim would therefore not be appropriate. *See generally Coastal Sav. Bank v. Arkwright-Boston Mfrs. Mut. Ins. Co.*, 686 F. Supp. 17, 20 (D. Me. 1988). However, in the interests of judicial economy, so that this will not be the only unresolved claim remaining in this action, and because the necessary outcome is clear under

applicable law, I will address this claim at this time.

Curran apparently relies on the fact that he presented his “Woods Hole employee card” to a representative of the Trust on April 2, 1993, as a means of identification, as part of the application and approval process to obtain his pension benefit. Amended Complaint ¶¶ 64-65.

The principle of estoppel allows recovery upon a showing of (1) a representation of fact made to the plaintiff; (2) a rightful reliance thereon; and (3) injury or damage to plaintiff resulting from a denial of benefits by the party making the representation. Courts have frequently refused to apply estoppel principles to require payment of pension funds, usually referring to the basic policy of protecting the actuarial soundness of pension plans.

Cleary v. Graphic Communications Int’l Union, 841 F.2d 444, 447 (1st Cir. 1988). *See also* *Chambless v. Masters, Mates & Pilots Pension Plan*, 772 F.2d 1032, 1041 (2d Cir. 1985) (listing cases).

The amended complaint makes no allegation that the representative of the Trust had authority or apparent authority to bind the Trust; it does not even suggest that the card shown to this individual revealed that Curran would be doing work for Woods Hole that would in any way implicate the post-retirement restrictions of the Plan Regulations. The First Circuit in *Cleary* declined to impose estoppel under far more compelling factual circumstances than are presented in the amended complaint here. The defendants are entitled to judgment as a matter of law on Count VI of the amended complaint.

C. Breach of Fiduciary Duty (Amended Complaint, Count VII)

Citing *Varity Corp. v. Howe*, 116 S.Ct. 1065 (1996), Curran asserts that he, as a beneficiary of the defendant plans, has a private cause of action against them for breach of fiduciary duty. While

Varity did establish for the first time that beneficiaries of ERISA plans may seek relief for breach of fiduciary obligation, 116 S.Ct. at 1079, Curran’s claim suffers from two fatal flaws. First, the Supreme Court in *Varity* made clear that “where Congress elsewhere provided adequate relief for a beneficiary’s injury, there will likely be no need for further equitable relief, in which case such relief normally would not be ‘appropriate.’” *Id.* (citation omitted). Unlike the *Varity* plaintiffs, Curran enjoys the right to seek relief under ERISA’s provisions for recovery of withheld benefits and enforcement of ERISA requirements against the defendants, as he has done. Therefore, equitable relief should not be available to him.

The second flaw is that relief for breach of fiduciary obligation is available, if at all, against the trustees or other fiduciaries of a benefit plan, not against the plan itself. A benefit plan cannot be a fiduciary with respect to itself. 29 U.S.C. § 1002(21)(A) (defining “fiduciary”); *Todd v. AIG Life Ins. Co.*, 47 F.3d 1448, 1458 (5th Cir. 1995); *see also Cottrill v. Sparrow, Johnson & Ursillo, Inc.*, 74 F.3d 20, 22 (1st Cir. 1996) (discussing attributes of fiduciary status). None of the case law cited by Curran involves a claim for breach of fiduciary duty against a benefit plan. He seeks this relief only against the plans themselves. For this reason as well, the defendants are entitled to summary judgment on Count VII of the amended complaint.

D. Fraud (Counterclaim, Count II)

Section 1144 of ERISA provides that, with exceptions not relevant to this case, “the provisions of this subchapter and subchapter III of this chapter shall supercede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title.” 29 U.S.C. § 1144(a). This language has been construed to preempt all state-law claims

made by plaintiffs against pension plans and trustees, insofar as the claims related to such plans. *E.g., Degnan v. Publiker Indus., Inc.*, 83 F.3d 27, 29 (1st Cir. 1996) (common law misrepresentation). Here, the defendants do not address their fraud claim in their memoranda, but their Statement of Material Facts does include several facts that can be construed to support this claim. Defendants' Statement ¶¶ 18, 25-35, 38. Curran does not address this claim in his memoranda.

The defendants suggest that Curran committed fraud in order to obtain and continue to receive pension benefits. Counterclaim ¶ 29. This claim clearly relates to the pension benefit plan. It is therefore preempted by ERISA, the statutory scheme under which the defendants assert jurisdiction in this court for the counterclaim. *Id.* ¶ 1. *See generally Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 47 (1987); *Diduck v. Kaszycki & Sons Contractors, Inc.*, 974 F.2d 270, 288 (2d Cir. 1992) (common-law fraud claim). Entry of judgment for Curran on this claim is appropriate.

E. Attorney Fees

Curran seeks an award of attorney fees and costs under 29 U.S.C. § 1132(g) in Count VIII of his amended complaint. The defendants request such an award in their motion for summary judgment. In the First Circuit, an application for attorney fees in an ERISA action is subject to a five-factor standard which considers

(1) the degree of bad faith or culpability of the losing party; (2) the ability of such party to personally satisfy an award of fees; (3) whether such award would deter other persons acting under similar circumstances; (4) the amount of benefit to the action as conferred on the members of the pension plan; and (5) the relative merits of the parties' positions.

Gray v. New England Tel. & Tel. Co., 792 F.2d 251, 257-58 (1st Cir. 1986). These factors are guidelines; every factor need not be considered in every case, and no one factor is dispositive. *Id.*

at 258. An award of fees “is not virtually automatic, but remains discretionary with the trial judge.” *Id.* at 259. Failure of proof is not to be equated with bad faith. *Id.*

It is unlikely that an award of attorney fees to the defendants would meaningfully serve to deter other persons acting under circumstances similar to those encountered by Curran. If Curran’s action were a recurrent problem, it would likely involve individuals who, like him, have not yet reached normal retirement age. Upon reaching normal retirement age, such individuals lose six months of benefits under the terms of the plan. Needless to say, this penalty is a substantial deterrent by itself. The benefit of the action conferred on the members of the pension plan is only the amount to be recouped from Curran. Curran’s position in this action was not entirely without merit, nor can I say that it was taken in bad faith. His ability to satisfy an award of attorney fees is unknown, but in my view investigation of that factor is unnecessary. I recommend that no award of attorney fees and costs be made in this case.

V. Conclusion

For the foregoing reasons, I recommend that the plaintiff’s motion for summary judgment be **GRANTED** as to Count II of the counterclaim and otherwise **DENIED**, and that the defendants’ motion for summary judgment be **GRANTED** as to all counts of the amended complaint and Count I of the counterclaim and otherwise **DENIED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge’s report or

proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 27th day of March, 1997.

*David M. Cohen
United States Magistrate Judge*